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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF WASHINGTON

14 THE LANDS COUNCIL; HELLS
CANYON PRESERVATION
15 COUNCIL; and LEAGUE OF
WILDERNESS DEFENDERS –
16 BLUE MOUNTAINS
BIODIVERSITY PROJECT,

17
18 Plaintiffs,

19 v.

20 UNITED STATES FOREST
21 SERVICE,

22 Defendant.
23
24
25

Case No. CV-12-619-LRS

**MEMORANDUM IN REPLY TO
PLAINTIFFS' RESPONSE TO
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

COMES NOW Defendant United States Forest Service, by and through its counsel of record, and hereby submits its Memorandum in Reply to Plaintiffs' Response to Defendant's Cross-Motion for Summary Judgment.

I. INTRODUCTION

Plaintiffs challenge the Forest Service's analysis of the environmental impacts from the South George Vegetation and Fuels Management Project ("South George Project" or "Project"), a project that will improve the forest health, vigor, and resilience to fire, insects, and disease and provide for sawlogs and wood products to regional and local industries. The Project aims to move the Umatilla National Forest ("Forest") toward the desired future conditions for species composition, structural diversity, stocking densities, and fuel loadings. Plaintiffs' objections to the Project are based on a misunderstanding of how the Project will meet the Umatilla National Forest Land and Resources Management Plan ("Forest Plan") requirements to provide for primary cavity excavator viability, confusion about which standards apply to Project treatments authorized in Riparian Habitat Conservation Areas, and disagreement with the methodology the Forest Service used to determine the presence of potential wilderness areas in the South George Project Area.

As shown in Defendant's opening brief, *see Def.'s Mem. Supp. Cross-Mot. Summ. J.*, ECF No. 31, and as set forth more fully below, Plaintiffs have not shown that there has been any violation of the law. The South George Project is consistent with the Forest Plan and its relevant amendments by providing sufficient protection to primary cavity excavators and adhering to the standards and guidelines of the Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California ("PACFISH") to protect

1 the salient features of Riparian Habitat Conservation Areas. The Project therefore
2 satisfies the National Forest Management Act (“NFMA”). In addition, the Forest
3 Service complied with its obligations under the National Environmental Policy Act
4 (“NEPA”) by appropriately applying Agency-defined criteria for determining the
5 presence of potential wilderness areas, and adequately disclosing its reasoning in
6 the Project’s Final Environmental Impact Statement (“FEIS”). Defendant is thus
7 entitled to summary judgment on Plaintiffs’ claims.

8 **II. LEGAL ARGUMENT**

9 **A. The Forest Service Complied With NFMA Because the South George** 10 **Project is Consistent With the Umatilla Forest Plan.**

11 **1. Neither NFMA Nor the Forest Plan Require the Forest** 12 **Service to Assess Viability at the Project Level.**

13 Defendant has demonstrated that both NFMA and its regulations, and the
14 Forest Plan do not require the Forest Service to provide for species’ viability at the
15 project level. ECF No. 31 at 7-8. Plaintiffs continue to argue, despite the plain
16 language of NFMA, its regulations, and related case law, that because NFMA
17 requires site-specific projects to comply with the relevant forest plan, then the site-
18 specific project itself, here the South George Project, must comply with the viability
19 requirement at the project level. *Pls.’ Combined Resp.-Reply to Fed. Def.’s*
20 *Combined Mot. Summ. J. and Resp.*, ECF No. 34 at 2 (citing 16 U.S.C. § 1604(i)).
21 Plaintiffs’ argument is untenable and it must be rejected.

22 Defendant’s opening brief demonstrates why Plaintiffs’ interpretation of
23 NFMA and its regulations is wrong. Defendant explained that, based on the plain
24 language of the applicable NFMA regulation, the Forest Service is required to only
25 “maintain viable populations . . . in the planning area,” 36 C.F.R. § 219.19 (1982)

1 (emphasis added).¹ ECF No. 31 at 7-8. The regulations defined “planning area” as
2 “[t]he area of the National Forest System covered by a regional guide or forest
3 plan.” *Id.* § 219.3 (1982). In the instant case, “the area of the National Forest
4 System covered by a . . . forest plan” is the Umatilla National Forest. Nowhere do
5 those regulations indicate that the minimum viable population requirement applies
6 to each site-specific project.

7 This interpretation of the 1982 viability requirement is consistent with Ninth
8 Circuit cases that discuss the Forest Service’s obligations under those standards as
9 being only forest-wide requirements. *See Neighbors of Cuddy Mountain v.*
10 *Alexander*, 303 F.3d 1059, 1069 (9th Cir. 2002) (discussing the 1982 regulations
11 and “compliance with NFMA’s forest-wide species viability requirements”) (emphasis added); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428
12 F.3d 1233, 1249-50 (9th Cir. 2005) (stating that the “Forest Service had a
13 substantive duty under NFMA to ensure forest-wide goshawk viability before
14 approving a project”) (emphasis added); *Utah Envtl. Cong. v. Russell*, 518 F.3d 817,
15 821 (10th Cir. 2008) (“NFMA requires the Forest Service to develop broad
16 directives for management of a give forest and to consider individual projects within
17 the context of this forest-wide management plan.”) (emphasis added). Thus, there is
18 no duty to make a project level viability assessment.

19
20 Plaintiffs’ reliance on *Native Ecosystems Council v. Tidwell*, 599 F.3d 926
21 (9th Cir. 2010), to suggest otherwise is misplaced. In *Native Ecosystems Council*,

22
23 ¹ Although there are 2012 NFMA forest planning regulations, the Umatilla Forest
24 Plan was developed under the 1982 NFMA planning regulations, which were
25 incorporated into that Forest Plan.

1 the Ninth Circuit rejected the Forest Service’s use of habitat as a proxy for
2 analyzing a project’s impacts to a species’ population when the species did not
3 occupy the project area. *Id.* at 933. But nowhere in that opinion did the court
4 indicate that the 1982 viability standard was to be applied at the project level.
5 Indeed, the only place where the opinion ever addresses the scale at which the
6 viability requirement applies is when the court quotes the Beaverhead National
7 Forest Plan which provides that “[v]iable populations of all existing wildlife species
8 will be maintained by providing a diversity of habitats throughout the Forest.” *Id.* at
9 932 (emphasis added). Moreover, in discussing the purpose of a forest plan, the
10 Ninth Circuit recognized that “[t]he entire point of a forest-wide plan is that
11 complying with its forest-wide standards will ensure forest-wide species and habitat
12 preservation.” *Id.* at 940 (emphasis added).

13 In addition, as Defendant demonstrated earlier, there is nothing in the
14 Umatilla Forest Plan standard and guidelines that requires assessment of viability of
15 primary cavity excavators at the project level. ECF No. 31 at 8. Specifically to
16 primary cavity excavators that are at issue here, the Forest Plan provides that
17 “[u]nless specified in management area direction, as a minimum, provide the
18 required number of sizes of snags throughout the Forest to maintain primary cavity
19 excavators at 40 percent of their potential population throughout their present
20 range.” AR 5171 (emphasis added). The Forest Plan FEIS also specifically
21 describes the viability standard as applying to the planning area. AR 4567;
22 AR 4573. There is no language to suggest that the Forest Service has to demonstrate
23 that it is maintaining viable populations in the project area. In their response,
24 Plaintiffs cite to specific management areas standards and guidelines in the Umatilla
25 Forest Plan that they believe incorporate a viability duty at the project level, ECF

1 No. 34 at 4, but none of these provisions have the effect of project level standards or
2 guidelines.

3 The Forest Service’s interpretation of its Forest Plan is reasonable, indeed,
4 more reasonable, than Plaintiffs’. For the Court to find that Plaintiffs’ interpretation
5 of the Forest Plan trumps the Forest Service’s, the record must “plainly
6 demonstrate[] that the Forest Service made a clear error in judgment in concluding
7 that [the South George Project] meets the requirements of NFMA and the relevant
8 Forest Plan.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 470 (9th Cir. 2010)
9 (“*Carlton*”) (citing *Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008)
10 (en banc), *overruled on other grounds*). Plaintiffs have failed to make this showing.
11 The Forest Service’s interpretation of the Forest Plan is reasonable, and the Court
12 must defer to that interpretation. *Ecology Ctr. v. Castenada*, 574 F.3d 652, 661 (9th
13 Cir. 2009); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953,
14 962 n.8 (9th Cir. 2005) (agency’s interpretation of its Forest Plan should be upheld
15 unless “plainly erroneous or facially inconsistent with the Plan’s language”); *Forest*
16 *Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1098 (9th Cir. 2003) (decision can
17 be overturned under NFMA only if “plainly erroneous or inconsistent with the
18 Forest Plan”).

19 Moreover, the Forest Service’s interpretation of the Forest Plan is consistent
20 with the Ninth Circuit’s recent decisions in *Earth Island Institute v. U.S. Forest*
21 *Service*, 697 F.3d 1010 (9th Cir. 2012) (“*Earth Island*”), and *Carlton*, in which the
22 court held that forest plans with similar language to the Umatilla Forest Plan did not
23 include a requirement to ensure species viability at the project level. In *Earth*
24 *Island*, the Ninth Circuit held that even if the Lake Tahoe Basin Management Unit
25 Forest Plan incorporated the 1982 regulations, any viability requirements “were

1 expressly incorporated only at the planning level rather than the project level.”
2 697 F.3d at 1015-16. Likewise, in *Carlton*, the Ninth Circuit interpreted a provision
3 of the 2004 Sierra Nevada Forest Plan Amendment that stated the plan would
4 “provide habitat . . . necessary to maintain well-distributed viable populations . . . in
5 the planning area” as “pertain[ing] to the planning area, not the project area at
6 issue.” 626 F.3d at 470-71. The logic in the *Earth Island* and *Carlton* cases, and
7 the similarity of the Forest Plan language here, makes clear that this case must be
8 resolved in the same way.

9 2. The FEIS Demonstrates That Primary Cavity Excavator
10 Populations Will Be Maintained at the Forest Level.

11 Plaintiffs claim that even if the viability standard applies Forest-wide, the
12 Forest Service failed to provide adequate habitat for primary cavity excavators
13 because it cannot provide 3 large snags per acre when only an average of 2.02 large
14 snags per acre exist in dry forests Forest-wide. ECF No. 34 at 6. Plaintiffs’
15 inappropriately focus exclusively on one set of static numbers. Their
16 characterization of the snag density is misleading and they fundamentally
17 mischaracterize the FEIS.

18 As explained in Defendant’s opening brief, the Forest Service used
19 methodology consistent with the best available science to determine the historical
20 snag density distribution across the Forest by forest type. ECF No. 34 at 9; *see also*
21 AR 25317-349; AR 29269; AR 29270-272. That Forest-wide analysis showed that
22 there are currently an overabundance of acres in dry forests with high densities of
23 large snags (>4 snags/acre) and a deficit of acres with low densities of large snags
24 (1-4 snags/acre) as compared to historical conditions. AR 29269-270 (Figure 3-9).
25 Thus, to move the Forest toward its historical conditions—which should provide

1 habitat for primary cavity excavators, AR 29273—the Project FEIS ensures that if
2 harvest of large snags in dry forests is to occur, it will not reduce the snag density
3 below 3 large snags per acre. AR 29269; AR 29273. In other words, where there is
4 an overabundance of snags per acre of dry forest, the Project will “retain” a
5 minimum of 3 large snags per acre. AR 29269. Nothing in the FEIS says that the
6 South George Project will create more large snags than currently exist Forest-wide
7 to ensure that dry forests contain 3 large snags per acre. And nowhere in the record
8 does the Forest Service state that 3 large snags per acre are required in dry forests
9 Forest-wide to maintain primary cavity excavator viability.

10 This comparative approach of historical and existing snag density distribution
11 is consistent with the management direction in the Umatilla Forest Plan, as amended
12 by the Revised Continuation of Interim Management Direction Establishing
13 Riparian, Ecosystem and Wildlife Standards for Timber Sales (“Eastside Screens”),
14 that provides that the Forest Service “will maintain snags . . . at 100% potential
15 population levels of primary cavity excavators” by using “the best available science
16 on species requirements.” AR 9543. The Eastside Screens’s chosen means to
17 maintain viability is to ensure retention of sufficient structural elements necessary
18 for species survival. This is what the South George Project does by moving the
19 Forest toward its historical snag density distribution. In addition to the analysis of
20 snag density distribution, the Forest Service used other methodologies and design
21 features recommended by the best available science to ensure sufficient snag habitat
22 into the future, including:

- 23 • Using methodologies recommended by Rose, *et al.* (2010) to consider
24 fall rate of snags, the rate at which green trees would reach certain
25 diameters and function as replacement snags, and implementation of

1 monitoring of snags and live tree habitats. *See* AR 14629 (Rose, *et*
2 *al.*); AR 29123-124 (FEIS – Project Design Features and Management
3 Requirements);

- 4 • Leaving overly dense stands in fully stocked condition after treatment
5 that will provide a source of future snags. AR 29273;
- 6 • Retaining “all functioning snag habitat (broken tops, signs of
7 excavation, etc.) . . . wherever possible.” AR 29269;
- 8 • Leaving most large trees (>21 inches diameter at breast height (“dbh”))
9 as part of the replacement tree stock for future snag recruitment.
10 AR 29269; AR 29273;
- 11 • Requiring at least 16 leave trees per acre following treatment to
12 provide a source for future snags. AR 29273;
- 13 • Leaving of small diameter snags (10 to 19 inches dbh) that are also
14 used by primary cavity excavators. AR 29273;
- 15 • Prohibiting the piling of slash against snags to reduce snag loss during
16 prescribed burning. AR 29122.

17 All of the management requirements and project design features listed above
18 function to maintain the density and distribution of existing snags and provide a
19 source of snags in the future to return the Project Area to conditions more in line
20 with the historical range of variability. In this case, the Forest Service assessed the
21 viability of primary cavity excavators by evaluating the impact to those habitat
22 components in the Project Area and comparing those impacts to the availability of
23 habitat Forest-wide.

24 Based upon the application of these requirements and the best science
25 available, the Forest Service calculated that the “project would affect less than 1

1 percent (.006) of the forested land on the Umatilla National Forest. AR 29274. The
2 Forest Service then concluded “[t]he amount of effect from this project is too small
3 to cause changes in cavity excavator populations. AR 29274. The mere fact that
4 the South George Project may impact some primary cavity excavator habitat does
5 not mean that it has violated any Plan-based viability requirement. *See Castaneda*,
6 574 F.3d at 663 (“A habitat disturbance does not necessarily mean that a species’
7 viability will be threatened.”); *McNair*, 537 F.3d at 997 (“That a proposed project
8 involves some disturbance to the forest does not prohibit the Forest Service from
9 assuming that maintaining a sufficient amount of suitable habitat will maintain
10 species’ viability.”). Therefore, the Project is consistent with the Forest Plan and
11 continued viability of primary cavity excavators is expected on the Umatilla
12 National Forest. *Id.*

13 Here, the Forest Service has conducted a thorough analysis that supports its
14 conclusion that the South George Project will ensure primary cavity excavators
15 populations. The deferential standard of review of agency actions “is narrow,” and
16 the reviewing court is not to “substitute [its] judgment for that of the agency.”
17 *Earth Island Inst.*, 697 F.3d at 1013 (citing *McNair*, 537 F.3d at 987). Plaintiffs
18 have failed to meet their burden of showing that the Forest Service acted in a
19 manner that was “arbitrary, capricious, an abuse of discretion, or otherwise not in
20 accordance with law.” *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1168
21 (10th Cir. 2007) (citing 5 U.S.C. § 706(2)(A)). The Court should deny Plaintiffs’
22 motion for summary judgment on this issue. Summary judgment in favor of
23 Defendant is warranted.

1 3. Even if the Forest Plan Contains a Project Level Viability
2 Requirement, the Forest Service Has Satisfied It.

3 To the extent that the Forest Plan does impose any project level duties with
4 respect to primary cavity excavators, either through the incorporation of the 1982
5 viability requirements or otherwise, the Forest Service has complied with such
6 duties. As noted above, the Eastside Screens's chosen means to maintain primary
7 cavity excavator populations is to ensure retention of sufficient structural elements
8 necessary for species survival. The Project FEIS documents compliance with the
9 Eastside Screens's management direction with the use of best available science to
10 determine optimal snag density distribution throughout the South George Project
11 Area by forest type. AR 9486; AR 9543; *see also*, AR 29245; AR 29451-453;
12 AR 29663-664; AR 29670-671; AR 29942.

13 Plaintiffs make the same argument with respect to the Project Area—that the
14 Forest Service cannot provide 3 large snags per acre in the Project Area when only
15 1.1 snags per acre exist—as they do the Forest as a whole. ECF No. 34 at 4. Again,
16 Plaintiffs misunderstand the 3 snag per acre number. Similar to the Forest-wide
17 analysis, the Forest Service compared the historical and existing snag density
18 distribution in dry forests in the Project Area. AR 29273-274. And similarly, the
19 Forest Service found an overabundance of acres with too many large snags
20 (>4 snags per acre), and a deficit of acres with lower large snag density (1-4 snags
21 per acre). AR 29269; AR 29270. In order to move the Project Area toward
22 historical conditions and provide the structural features that will maintain primary
23 excavator populations, the Forest Service determined that, where snags will be
24 harvested, it should retain at least 3 large snags per acre. AR 29269; AR 29273.

1 Indeed, the use of best available science to determine the optimal snag density
2 distribution by forest type, and the other design features incorporated in the South
3 George Project (outlined above) ensure that the Project Area will provide the
4 structural features necessary to maintain primary excavator populations not only
5 immediately post-Project implementation, but in the future. Plaintiffs have failed to
6 demonstrate how the Project violates NFMA. Summary judgment should be entered
7 in favor of Defendant.

8 B. The Forest Service Complied With NFMA By Following the
9 Appropriate Standards When It Authorized Fire and Fuels Management
10 Treatments in Riparian Habitat Conservation Areas.

11 As explained in Defendant's opening brief, the South George Project is
12 consistent with PACFISH because the treatments that the Project authorizes meet
13 one of PACFISH's standards, FM-1, which allows fire and fuels management
14 treatments in Riparian Habitat Conservation Areas so long as certain objectives are
15 met. ECF No. 31 at 15-22. Plaintiffs do not argue that the treatments fail to meet
16 the requirements of the FM-1 standard. Rather, Plaintiffs respond that the Forest
17 Service's reliance on the FM-1 standard is *post hoc* rationalization and unsupported
18 by the record, and continue to insist that the Forest Service was actually trying to
19 inappropriately apply timber management standard, TM-1, to authorize such
20 treatments. As demonstrated below, Plaintiffs' contention is unsubstantiated, the
21 actions comply with PACFISH, and Defendant is thus entitled to summary judgment
22 on this claim.

1 1. The Administrative Record Demonstrates That the Forest
2 Service Relied on the FM-1 Standard to Authorize Fire and Fuel
3 Treatments in Riparian Habitat Conservation Areas.

4 The administrative record shows that the Forest Service articulated the
5 justification for authorizing fire and fuels management treatments in Riparian
6 Habitat Conservation Areas at the time it made its decision. Although the FEIS may
7 not specifically reference the FM-1 standard by name, it unequivocally defines the
8 treatments as fire and fuels management treatments, and the environmental analysis
9 discusses the impacts in terms of the standard’s specific requirements. The
10 application of the FM-1 standard to authorize these treatments is not *post-hoc*
11 rationalization and should be upheld. *See Public Citizen v. Nuclear Regulatory*
12 *Comm’n*, 573 F.3d 916, 923 (9th Cir. 2009) (upholding agency’s decision “of less
13 than ideal clarity if the agency’s path may reasonably be discerned”).

14 First, the Project FEIS unmistakably identifies the treatments in Riparian
15 Habitat Conservation Areas and discusses their purpose to be fire and fuels
16 management treatments rather than timber management or other activities. For
17 example, the FEIS describes the treatments under the proposed action as “Riparian
18 Habitat Conservation Area (RHCA) Fuels Treatment,” and lists the treatments in a
19 section separate from “Timber Harvest.” AR 29090-91. Indeed, all throughout the
20 FEIS, it describes the treatments within the Riparian Habitat Conservation Areas as
21 fire and fuels management treatments rather than timber management activities. *See*
22 AR 29096 (describing decisions to be made and “commercial timber harvest, fuels
23 treatments (landscape prescribed fire, non-commercial thinning, and non-
24 commercial mechanical treatment of approximately 25 acres in [Riparian Habitat
25 Conservation Areas]) . . .”); AR 29116 (describing “[Riparian Habitat Conservation

1 Area] Fuels Treatments” under description of proposed action; AR 29117 (listing
2 “[Riparian Habitat Conservation Area] non-commercial mechanical fuel treatments”
3 as a separate item under summary of proposed activities); AR 29118 (describing
4 Riparian Habitat Conservation Area activities “to reduce probability of crown fire
5 initiation”); AR 29169 (discussing purpose of “[Riparian Habitat Conservation
6 Area] Fuels Treatment” as “reduc[ing] probability of crown fire initiation” and
7 “disrupt[ing] crown continuity”); AR 26196 (discussing the impacts of the “fuels
8 treatment”); AR 29186 (applying separate fish habitat restoration criteria to the
9 Riparian Habitat Conservation Area treatments from the rest of the project);
10 AR 29238 (discussing purpose of Riparian Habitat Conservation Area fuels
11 treatments). Thus, there is no doubt that the Forest Service considered the activities
12 occurring in the Riparian Habitat Conservation Areas as fire and fuels treatments,
13 and distinct from commercial timber harvest activities.

14 In addition, the FEIS and other project documents specifically reference
15 PACFISH’s fire and fuels management standards and the environmental analysis
16 analyzes the treatments impacts in terms of the requirements imposed in the FM-1
17 standard. For example, the FM-1 standard was specifically referenced in the fish
18 biologist’s document to the interdisciplinary team members, AR 21546,
19 demonstrating that the FM-1 standard was considered early in the NEPA process.
20 In its discussion of the Project design features and management requirements, the
21 FEIS discloses that “PACFISH standards and guidelines related to timber harvest,
22 roads, and fire, apply to this project and are incorporated by reference into this
23 document.” AR 29188 (emphasis added); *see also* AR 29458 (same). And the FEIS
24 discusses the impacts of the Riparian Habitat Conservation Area fire and fuels
25 treatments to water quality in terms of the FM-1 standard’s language that fuel

1 treatments must be designed “so as to not prevent attainment of Riparian
2 Management Objectives.” *Compare* AR 29169 (“This fuels treatment would not be
3 expected to prevent attainment or retard recovery of the water temperature Riparian
4 Management Objective (RMO).”) (emphasis added) *with* AR 9144 (FM-1 standard
5 providing that fuel treatments must be designed “so as not to prevent attainment of
6 Riparian Management Objectives.”) (emphasis added). The record demonstrates
7 that reliance on the FM-1 standard to authorize fire and fuel treatments in the
8 Riparian Habitat Conservation Areas is not *post hoc* rationalization.

9 Despite Defendant’s demonstration that the TM-1 standard does not apply to
10 the Riparian Habitat Conservation Area fire and fuels management treatments in
11 this Project, Plaintiffs continue insist that the Forest Service relied on this standard
12 to authorize the treatments, and did so improperly. ECF No. 34 at 11-12. Plaintiffs
13 argue that a reference to timber management standard, TM-1, in the FEIS
14 demonstrates that the Forest Service relied on that standard to authorize timber
15 harvest in the Riparian Habitat Conservation Areas, rather than FM-1. ECF No. 34
16 at 8. Plaintiffs misunderstand the analysis in the FEIS. The FEIS discussed the
17 TM-1 standard in the context of its consistency review with the Eastside Screens.
18 *See* AR 29448. The Eastside Screens’s standard and guideline for timber
19 management activities in riparian areas directs that “timber sales will not be planned
20 or located” in such areas. AR 29447. Referencing the TM-1 standard, the FEIS
21 discloses that the PACFISH standards for timber management in riparian areas
22 apply in lieu of the Eastside Screens’s riparian standard. AR 29447-448. However,
23 in discussing the timber management treatments proposed by the Project, the
24 consistency review finds that “[n]one of the silvicultural proposed actions . . . will
25 occur in any of the riparian habitat conservations areas established by PACFISH.”

1 AR 29448. This is further evidence that the Forest Service did not rely on the TM-1
2 standard to authorize the treatments in Riparian Habitat Conservation Areas.

3 As demonstrated above, the Forest Service relied on the FM-1 standard to
4 authorize RHCA fire and fuels treatments and articulated the basis for its decision in
5 the FEIS.² It was not *post hoc* rationalization. The Forest Service appropriately
6 applied the FM-1 standard consistent with the requirements in PACFISH, and thus
7 complied with NFMA. Because the Forest Service's decision complies with
8 PACFISH and NFMA, no Forest Plan amendment is needed. *See* ECF No. 34 at 12.
9 The Court should deny Plaintiffs' motion for summary judgment and find in favor
10 of Defendant.

11 C. The Forest Service Took a Hard Look at Impacts to Potential
12 Wilderness Areas, and Thus Complied With NEPA.

13 Consistent with its obligations under NEPA, the Forest Service took a hard
14 look at the application of a 300-foot roadside buffer when analyzing the South
15 George Project Area for potential wilderness areas. Plaintiffs argue that it was
16 arbitrary and capricious to apply a standard 300-foot roadside buffer to exclude
17 evidence of past harvest activities to areas that contain little or no trees. ECF
18 No. 34 at 13-14. In doing so, Plaintiffs argue that the Forest Service "disregarded
19 [a] unique aspect of the [] Forest; namely, its steppe-shrublands." *Id.* at 13.

20
21 ² Misreading Defendant's brief, Plaintiffs state that Defendant wrongly concludes
22 that "the agency's rationale for the proposed harvest irrelevant [sic]." ECF No. 34
23 at 9 (citing ECF No. 31 at 19 n.12). Defendant's brief says no such thing, but states
24 that the Forest Service does not need to articulate how the Project meets a standard
25 that is not applicable to the proposed action.

1 In identifying areas that might qualify for potential wilderness, the Forest
2 Service did not ignore areas that lacked trees in applying a 300-foot roadside buffer.
3 The Forest Service applied the roadside buffer to exclude areas inconsistent with
4 potential wilderness because they contained evidence of past harvest or road
5 maintenance activities that resulted in recognizable stumps, skid trails, and uneven
6 canopy closure. AR 29499. The Forest Service also recognized that “stumps are
7 not present along every mile of forest road.” AR 29499; *see also* AR 2949
8 (recognizing that evidence of past harvest “occur to varying degrees adjacent to
9 forest roads”).

10 The Forest Service also considered the Inventory Criteria in Forest Service
11 Handbook 1909.12 (71.1) and the Boundary Adjustment Guidelines in FSH 1909.12
12 (72.5). AR 29327; AR 29496-521 (Appendix H); AR 29522-532 (Appendix I);
13 AR 29599-624. Those Boundary Adjustment Guidelines explicitly direct the Forest
14 Service, when adjusting boundaries for potential wilderness areas, to
15 use semi-permanent human-made features that are locatable on the
16 map and on the ground. Roads, trails, dams, powerlines and
17 pipelines, and bridges may be used. In addition, lines may be
18 drawn parallel and set back a given distance from any of these
features with well-defined starting and ending points.

19 FSH 1909.12(72.5); *see also id.* (“Establish boundaries that are easy to define and
20 locate on the ground and that can be managed.”) The Forest Service did exactly as
21 the Forest Service Handbook directed: in its professional judgment, it drew a
22 “uniform, measurable” boundary parallel to and set back a given distance from
23 existing roads to facilitate easy identification of potential wilderness areas.
24 AR 29499. Additionally, the Forest Service specifically addressed this issue in its
25 response to comments on the draft EIS. AR 29599-624. The Forest Service’s

1 experts are entitled to deference in applying criteria used to identify potential
2 wilderness areas, and the Court should defer to the Forest Service's technical
3 expertise. *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 377 (1989); *see*
4 *also Kritchbaum v. U.S. Forest Serv.*, 973 F.Supp. 585, 591-92 (W.D. Va. 1997),
5 *aff'd* 139 F.3d 890 (4th Cir. 1998) (table) (Forest Service entitled to rely on its own
6 data and method of determining old growth . . . the court must defer to the Forest
7 Service's scientific methodology); *Utah Env'tl. Cong. v. Bosworth*, 285 F.Supp.2d
8 1257, 1265 (D. Utah 2003), *rev'd on other grounds* (choice of scientific
9 methodology is within agency's discretion).

10 Plaintiffs argue that the Forest Service could have easily identified where
11 steppe-shrublands occur alongside roads and could have then excluded application
12 of the roadside buffer to those areas. ECF No. 34 at 15-16. However, whether the
13 Forest Service could easily identify these treeless areas is not the issue. As stated
14 above, the Forest Service recognized that such treeless areas existed along the
15 roadside but determined to apply a standard roadside buffer despite these areas in
16 order to create manageable boundaries. The Forest Service's approach makes sense,
17 particularly if one looks at a map of past harvest activity in the South George
18 Project Area. Contrary to Plaintiffs' claim that there are "large swaths of steppe-
19 shrublands" alongside the Forest roads, ECF No. 34 at 16, the map shows that there
20 is a patchwork of harvested and non-harvested areas along these roads. *See*
21 AR 29512. The harvested areas displayed on Map H-2A, AR 29512, do not include
22 areas where felling and clearing of trees for road maintenance purposes occurred, or
23 where harvest of trees for firewood, which is permitted within 300 feet of open
24 forest roads, occurred. AR 29499. Those areas also were excluded from potential
25 wilderness areas because such activities also create visible stumps in the road

1 corridor. *Id.* Review of the map alone demonstrates that it would have been
2 difficult for the Forest Service to manage a boundary that weaved back and forth
3 from a 300-foot roadside buffer to a boundary that ran right up to the road where
4 treeless areas occur.

5 Finally, to the extent that Plaintiffs' allege that such treeless areas were not
6 considered at all in identifying potential wilderness areas and the Project's impacts
7 to such areas, they are wrong. In Appendix I of the South George FEIS, the Forest
8 Service extensively documented the analysis of the undeveloped land mapped by
9 Oregon Wild during the comment period on the draft EIS.³ AR 29522-532. Oregon
10 Wild's map did not deduct acreage adjacent to roads. AR 29525; *see also*
11 AR 26528 (map). Thus, the Forest Service did consider potential wilderness areas
12 without application of the roadside buffer, and found that the area still did not
13 qualify as a potential wilderness area. AR 25746-748; AR 26364-366; AR 29499;
14 AR 29518; AR 29526.

15 Plaintiffs have not demonstrated that the Forest Service failed to take a hard
16 look at steppe-shrublands when the Forest Service applied a standard roadside
17 buffer when inventorying areas for potential wilderness. Plaintiffs' claim must fail
18 and judgment entered in favor of Defendant.

22
23 ³ Oregon Wild's area overlaps with the largest undeveloped area, Polygon 1, that
24 was mapped by the Forest Service. *Compare* AR 29529 (Map I-OW-2) *with*
25 AR 29517 (Map H-5); AR 29518 (Map H-5A).

1 D. Summary Judgment in Favor of the Forest Service is Warranted On All
2 Remaining Claims.

3 Neither Plaintiffs' opening brief nor its response to Defendant's cross-
4 motion for summary judgment address the viability determination for pine marten,
5 pileated woodpecker, or northern three-toes woodpecker. *See*, ECF No. 1 at 10
6 (Compl., ¶ 35). Plaintiffs have also failed to address issues related to alleged
7 violations of PACFISH through grazing and recreation. *Id.* at 12-13 (Compl.,
8 ¶¶ 44-46).

9 Defendant has shown that those issues are inadequately pleaded in the
10 Complaint and thus do not state viable claims. ECF No. 31 at 25-26; *Ashcroft v.*
11 *Iqbal*, 556 U.S. 662, 678-79 (2009). In addition, those issues are deemed
12 abandoned as Plaintiffs did not raise them in their summary judgment motion.
13 *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995); *Head Start*
14 *Family Educ. Program, Inc. v. Coop. Educ. Serv. Agency 11*, 46 F.3d 629, 635
15 (7th Cir. 1995); *Steeves v. City of Rockland*, 600 F. Supp. 2d 143, 173 n. 117
16 (D. Me. 2009) (citing *Grenier*, 70 F.3d at 678). Lastly, Plaintiffs failed to address
17 those same issues when raised by Defendant in its cross-motion for summary
18 judgment. If a party fails to properly respond to issues raised by the moving party
19 on summary judgment, summary judgment for the moving party is appropriate.
20 *Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) (We have previously held that
21 a plaintiff has abandoned claims by not raising them in opposition to the
22 defendant's motion for summary judgment); *Celotex Corp. v. Catrett*, 477 U.S. 317,
23 322 (1986). Those issues are unopposed, requiring the Court to grant summary
24 judgment to the Forest Service on those remaining issues.
25

1 **III. CONCLUSION**

2 Plaintiffs' NFMA claims are largely based on a misunderstanding of the
3 Project. By using the best available science to determine the optimal habitat
4 features for primary cavity excavators both Forest-wide and in the South George
5 Project Area, the Forest Service met the requirements to provide for 100 percent
6 potential population. In addition, the Forest Service disclosed and appropriately
7 applied PACFISH's fire and fuels management standard, FM-1, to treatments
8 located in Riparian Habitat Conservation Areas. The Forest Service thus complied
9 with NFMA. The Forest Service also complied with its obligations under NEPA to
10 take a hard look at its procedures for inventorying the South George Project Area
11 for potential wilderness areas. For the foregoing reasons, the Court should deny
12 Plaintiffs' motion for summary judgment and grant Defendant's motion for
13 summary judgment, and dismiss the case in its entirety.

14 Dated this 13th day of September 2013.

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